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D.C. Court Applies Common-Sense Limits to Davis-Bacon Act

Law360
April 14, 2014

On March 31, 2014, the U.S. District Court for the District of Columbia rejected a determination by the U.S. Department of Labor applying the Davis-Bacon Act (DBA) to a privately funded construction project. In *District of Columbia v. Department of Labor et al.*, 1:13-cv-00730, the court held that development of CityCenterDC, a large-scale urban redevelopment project in downtown Washington, D.C., did not involve construction of a "public building or public work" and therefore was not subject to DBA coverage. This decision is important because, as the court explained, "the DBA has never before been applied to a project that, like CityCenterDC, is privately financed, privately owned, and privately maintained." Slip op. at 16.

The DBA, 40 U.S.C. § 3141 *et seq.*, requires that a "provision stating the minimum wages to be paid various classes of laborers and mechanics" be inserted in "advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction of ... public buildings and public works of the Government or the District of Columbia." 40 U.S.C. § 3142(a). The DOL has issued regulations implementing the DBA, see 29 C.F.R. ch. 5, which defines a "public work" as a government construction project "carried on ... to serve the interests of the public." 29 C.F.R. §5.2(k).

In the project at issue, the District of Columbia had entered into a ground lease for District-owned land with a developer that in turn contracted for construction of buildings for private use, such as a hotel and an office building. The District imposed numerous requirements on the project (as detailed as the width of sidewalks)

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and participated in the planning effort. But the District did not contribute any funds for construction, did not contract with any of the firms performing the construction, and would not under the ground lease occupy any of the buildings that were to be constructed.

Nonetheless, the DOL's Administrative Review Board determined that the CityCenterDC project was a "public work" subject to the DBA. The DOL explained that to qualify as a "public work" under its regulations, the project need only serve the public interest "in some manner." Slip Op. at 20 (quoting the DOL). The DOL held that the project was a public work because the District was involved in planning and "design particulars," the District was a party to the ground lease, the project "serve[s] the interest of the general public," and several similar factors. *Id.* at 18-19 (quoting the DOL).

The district court rejected this ruling, finding that the DOL had misconstrued the DBA's statutory text and its own regulations. The court held that "the plain and obvious meaning of the statutory phrase 'public buildings and public works' does not encompass a boutique hotel, a private office building, a condominium, or an apartment building." *Id.* at 18. These private functions were the purpose of the development, and thus the resulting construction was not of a public work.

The court acknowledged the public benefits identified in the DOL's ruling but found those public benefits to be incidental to the project's purpose; they did not change the project's character from a private to a public construction project. As the court explained, borrowing from interpretations of similar statutory schemes, a "public work" is a concept that is "not technical but plain and specific." Slip Op. at 17 (quoting *United States v. Irwin*, 316 U.S. 23, 30 (1942)). The DOL had "lost the forest in the trees" by compiling individual benefits rather than considering the project's overall nature and purpose. *Id.* at 18.

The court also found that the DBA did not apply to CityCenterDC because "the plain language of the [DBA] suggests that Congress intended it to apply only to projects procured and funded by the government." *Id.* at 23. The court focused on the DBA's use of "advertised specifications" and its requirement that the federal or District government be a "party" to a "contract" for construction for the DBA to apply. *Id.* (quoting 40 U.S.C. § 3142(a)). The court also noted that the DBA's enforcement scheme contemplated the DBA's application only to government-funded contracts. *Id.* at 23-24. Thus, even setting aside whether CityCenterDC was a public work, the project still was not subject to DBA requirements because the District of Columbia government was not a party to any contracts for construction of the buildings.

Contractors can take some comfort in the court's ruling, which applies common-sense limits to the DBA's application: A project must be funded by the federal or District governments and must involve construction of truly public buildings to be potentially subject to the DBA.

This ruling could have further reach by influencing application of "Little Davis Bacon Acts" that set prevailing wage laws for construction projects in many states: Some states' versions of the act leave "public work" undefined or underdefined (such as Montana), and state courts thus may look to interpretation of the federal

act for guidance on what constitutes a "public work." The ruling may even offer guidance to state courts seeking to apply existing definitions of "public work" in states, such as Maryland and Hawaii that have such definitions in their Little Davis-Bacon Acts.

In addition, the court's decision sets an important limitation as the government agencies become increasingly creative in putting surplus real estate to use and private companies similarly look for more creative infill development opportunities. Multiple examples of projects similar to CityCenter are underway in the District of Columbia alone: In 2006, a developer paid the federal General Services Administration for the right to construct a mixed-use project over rail tracks behind the city's historic Union Station, and in 2012 another developer paid the District of Columbia for the right to construct a smaller development over a less-than-historic stretch of interstate highway.

Under the interpretation by the DOL, these projects likely would have been subject to the Davis-Bacon Act even if all the buildings were constructed for private use and no federal or District funds were provided for the work. Now, on the basis to the district court's ruling, it is clear that much more will be required to find that the DBA applies to these types of projects.